

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA by and through  
ARNOLD SCHWARZENEGGER, GOVERNOR,  
and the CALIFORNIA AIR RESOURCES  
BOARD,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, and STEPHEN L.  
JOHNSON, ADMINISTRATOR,

Respondents.

Docket No. 08-70011

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**MOTION FOR LEAVE TO INTERVENE AS PETITIONERS**

The State of Iowa and the State of Florida Department of Environmental Protection move to intervene in this action as party-petitioners pursuant to Fed. R. App. P. 15(d).

1. On January 2, 2008, the State of California ("California"), by and through Governor Arnold Schwarzenegger, and the California Air Resources Board ("CARB"), filed a Petition for Review with this Court seeking review of a final action by the United States Environmental Protection Agency ("EPA"), and its Administrator, Stephen L. Johnson. That final agency action denied

California's request, under section 209(b) of the Clean Air Act ("CAA"), 42 U.S.C. § 7543(b), for a waiver of preemption for California's regulations to control greenhouse gas emissions from new motor vehicles. These regulations would require reductions in fleet-average greenhouse gas emissions, including carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), and hydrofluorocarbons (HFCs), for most new passenger motor vehicles sold in California, beginning with the 2009 model year. This final agency action was issued by EPA on December 19, 2007 (a copy of the decision is attached hereto as Exhibit A).

2. Also on January 2, 2008, the State of New York, Commonwealth of Massachusetts, States of Arizona, Connecticut, Delaware, Illinois, Maine, Maryland, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the Commonwealth of Pennsylvania Department of Environmental Protection moved to intervene in this action as party-petitioners pursuant to Fed. R. App. P. 15(d). On January 11, 2008, the State of Minnesota also moved to intervene as a party-petitioner.

3. The State of Iowa has a strong interest in reviewing EPA's decision because it is contemplating promulgating new motor vehicle greenhouse gas emissions regulations with standards identical to California's. These regulations are also preempted by EPA's December 19, 2007 decision.

4. The State of Florida Department of Environmental Protection also has a strong interest in reviewing EPA's decision because it is in the process of promulgating new motor vehicle greenhouse gas emissions regulations for the State of Florida with standards identical to California's. These regulations are also preempted by EPA's December 19, 2007 decision.

5. These states ("Proposed Intervenors") seek to intervene because each of them has promulgated, or is contemplating promulgating, new motor vehicle greenhouse gas emissions regulations with standards identical to California's. These regulations are also preempted by EPA's December 19, 2007 decision.

### **BACKGROUND**

#### **Statutory Background: California's Authority to Set Emission Standards for Motor Vehicles**

6. The CAA authorizes EPA to regulate tailpipe emissions from new motor vehicles. 42 U.S.C. § 7521. Although CAA § 209(a), 42 U.S.C. § 7543(a), generally prohibits states from adopting their own emission standards for new motor vehicles, CAA § 209(b), 42 U.S.C. § 7543(b), grants California the authority to set its own emission standards because of that state's long-standing, severe air pollution problems, as well as its "pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of

laboratory for innovation.” Motor and Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1110-11 (D.C. Cir.1979) (explaining reasons for California’s unique status). Under CAA § 209(b), California must request and be granted a waiver of preemption from EPA before it may enforce any emissions regulations.

7. In 1977, Congress added CAA § 177, 42 U.S.C. § 7507, which authorizes other states to adopt and enforce emission standards for new motor vehicles that are identical to those of California for which a waiver has been granted by EPA.

**California’s Adoption of Greenhouse Gas Emission  
Regulations and Request for Waiver**

8. Recognizing that motor vehicles are the second largest source of greenhouse gas emissions in California, CARB approved regulations in September 2004 that limit the amount of greenhouse gases that may be emitted by light- and medium-duty passenger vehicles sold in California beginning in model year 2009. See, e.g., 2005 Cal. Regulatory Notice Reg. 1427 (Sept. 30, 2005) (noting 2004 amendments).

9. On December 21, 2005, pursuant to CAA § 209(b), California requested a waiver of preemption from EPA for California’s greenhouse gas emission regulations.

10. By letter dated December 19, 2007 to Governor Arnold Schwarzenegger, Administrator Johnson denied California's request.

**Proposed Intervenor's Adoption of Greenhouse Gas Emission Regulations Identical to California's, and Their Dependency on EPA's Granting of California's Request for Waiver**

11. Pursuant to their authority under CAA § 177, 42 U.S.C. § 7507, many states have adopted greenhouse gas emissions regulations for motor vehicles that are identical to California's regulations. See Conn. Agencies Regs. § 22a-174-36b; Code of Maine Regulations, 06-096 CMR Ch. 127; Code of Md. Regs. 26.11.34; 310 Code of Mass. Regs. 7.40; N.J. Admin. Code 7:27-29; NMAC 20.2.88; Title 6 of the N.Y. Code of Rules and Regs. Part 218-8; Ore. Admin. Regs. 340-257-0100; 25 Pennsylvania Code § 126.411; R. I. Low Emission Vehicle Program, Air Pollution Control Reg. No. 37; Vermont Air Pollution Control Regulations, Subchapter XI and Appendix F; Wash. Admin. Code Ch. 173-423. Indeed, some of the states are required as a matter of state law to adopt California's emission standards. See, e.g., Conn. Gen. Stat. § 22a-174g; Mass. G. L. Ch. 111, § 142K; N.J. Stat. Ann. § 26:2C-8.15, et seq.; Rev. Code Wash. 70.120A; Md. Code Ann. Envir. § 2-1102 (2007).

12. Pursuant to Executive Order 2006-13, Arizona is in the process of drafting rules adopting the California GHG regulation. Delaware and Illinois are considering adoption of California's regulations.

13. Proposed Intervenor State of Iowa is also considering promulgation of greenhouse gas emissions regulations for motor vehicles that are identical to California's regulations. On December 14, 2007, the newly-created Iowa Office of Energy Independence (OEI) submitted to Iowa's governor and general assembly a report entitled "Iowa Plan for Energy Independence," as required by Iowa Code section 469.4(1). The plan identifies strategies to, among other things, "reduce greenhouse gas emissions, both on an aggregate and per capita basis" as required by Iowa Code section 469.4(4)(f). In that plan OEI recommended that the State of Iowa "[j]oin 16 states that have adopted or are considering adopting the California emission standards for passenger vehicles." Iowa Office of Energy Independence, Iowa Plan for Energy Independence at 12 and 25 (Dec. 2007) available at [http://www.energy.iowa.gov/OEI/docs/Final\\_Plan.pdf](http://www.energy.iowa.gov/OEI/docs/Final_Plan.pdf).

14. Proposed Intervenor State of Florida Department of Environmental Protection is the agency of the State of Florida charged with the statutory responsibility pursuant to Chapter 403, Florida Statutes, to control and abate air pollution in the State of Florida. It also administers the CAA in the State of

Florida. It has commenced the rulemaking process to adopt California vehicle emission standards, including greenhouse gas vehicle emissions regulations, for the State of Florida as directed by Executive Order 07-127, issued by Florida Governor Charlie Crist on July 13, 2007. This Executive Order is one of three Executive Orders issued by Governor Crist that direct immediate action to address the impacts of global warming resulting from increases in atmospheric greenhouse gases.

15. However, because EPA's decision preempts California's regulations, Proposed Intervenor's regulations regarding motor vehicle greenhouse gas emissions are also preempted unless EPA's decision is overturned.

**The Proposed Intervenor's Have a Direct and Substantial Interest  
in the Action Because of the Effects of Global Warming  
and the Need to Address it Immediately**

16. Like California, Proposed Intervenor's recognize that motor vehicles are one of the most significant sources of the greenhouse gases that cause global warming. Global warming is already seriously and negatively impacting the public health, economies and environments of the Proposed Intervenor's, and its effects are expected to worsen in the absence of effective abatement prompted by immediate governmental action.

17. Adopting California's motor vehicle greenhouse gas regulations is also part of larger state strategies to abate greenhouse gas emissions. For example, several Northeastern states have agreed to stabilize and reduce carbon dioxide emissions from power plants. See <http://www.rggi.org/> (describing the Regional Greenhouse Gas Initiative). California, Arizona, New Mexico, Oregon and Washington launched the Western Climate Initiative in February 2007 to develop regional strategies to address climate change. See [www.westernclimateinitiative.org](http://www.westernclimateinitiative.org) (describing the Western Climate Initiative). Illinois and Iowa are part of the Midwestern Regional Greenhouse Gas Reduction Accord. See [www.midwesterngovernors.org/govenergynov.htm](http://www.midwesterngovernors.org/govenergynov.htm) (describing Midwestern Regional Greenhouse Gas Reduction Accord). Florida's Governor Crist has issued executive orders that require all Florida state agencies reporting to him to take immediate action to reduce greenhouse gas emissions; establish greenhouse gas reduction targets for the state; require that Proposed Intervenor Florida Department of Environmental Protection adopt rules to establish caps on greenhouse gas emissions from electric utilities in the State of Florida; require other Florida agencies to revise the Florida Energy Code for Building Construction to increase energy efficiency for new building and revise the Florida Energy Conservation



Standards to increase the efficiency of consumer products; and establish the Governor's Action Team on Energy and Climate Change to formulate recommendations for additional means of reducing the emission of greenhouse gases and addressing the impacts of global warming.

18. In addition, other states have adopted statutes and/or regulations regulating carbon dioxide from power plants. See, e.g., Rev. Code Wash. 80.70 (establishing mitigation requirements for power plants). Twenty-two states and the District of Columbia, have established Renewable Portfolio Standards, which require states and the District to increase the percentage of energy that they obtain from low-carbon energy sources such as solar, tidal and wind power, that promote far less or no global warming. See [http://www.pewclimate.org/what\\_s\\_being\\_done/in\\_the\\_states/rps.cfm](http://www.pewclimate.org/what_s_being_done/in_the_states/rps.cfm).

### **ARGUMENT**

#### **A. The Interests of the Proposed Intervenor Warrant a Grant of Intervention Under Fed. R. App. P. 15(d).**

19. Fed. R. App. P. 15(d) requires that a party seeking to intervene must explain its interest in the proceeding and move to intervene within 30 days after the petition for review is filed. Intervention under Rule 15(d) is permitted where the intervenor has a direct and substantial interest in the outcome of the action. See, e.g., New Mexico Dep't of Human Services v. HCFA, 4 F.3d 882, 884 n.2 (10th

Cir. 1993) (permitting intervention because intervenors had substantial and unique interest in outcome); Bales v. NLRB, 914 F.2d 92, 94 (6th Cir. 1990) (granting Rule 15(d) intervention to party with "substantial interest in the outcome of the petition"); Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 744 (D.C. Cir. 1986) (allowing Rule 15(d) intervention because petitioners were "directly affected by application" of agency policy).

20. The Proposed Intervenors have a direct and manifest interest in the outcome of this case because the enforceability of their regulations depends on EPA granting California a waiver of preemption under CAA § 209(b). EPA's denial of California's waiver thus preempts Proposed Intervenors' regulations as well as California's.

21. The application of effective greenhouse gas emission regulations would, at a minimum, begin the process of reducing the greenhouse gas emissions that cause global warming. It is not necessary that the Proposed Intervenors show that the regulations would solve the problem all at once. Massachusetts v. EPA, 127 S.Ct. 1438, 1457, 1458-59, 167 L.Ed.2d 248, 75 USLW 4149 (2007) ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.").

**B. The Liberal Intervention Policies Underlying Fed. R. Civ. P. 24 Further Support Granting Intervention Here.**

22. The intervention policies underlying Fed. R. Civ. P. 24 provide guidance in analyzing intervention under Rule 15(d), although the requirements of Rule 24 do not directly apply to motions to intervene in challenges to administrative actions in the federal appellate courts. See United States v. Bursey, 515 F.2d 1228, 1238 n.24 (5th Cir. 1975) (policies underlying intervention in the district courts may be applicable in the appellate courts, but are not controlling).

23. Addressing intervention as of right, Fed. R. Civ. P. 24(a)(2) provides that:

On timely motion, the court must permit anyone to intervene who: ... (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Rule 24(a) is construed liberally in favor of granting intervention. See United States v. City of Los Angeles, 288 F.3d 391, 397-98 (9<sup>th</sup> Cir. 2002); Southwest Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 818 (9<sup>th</sup> Cir. 2001); Fed. Savings & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11<sup>th</sup> Cir. 1993). The Proposed Intervenors easily meet Rule 24(a)(2)'s criteria.

24. The preemption of Proposed Intervenor's motor vehicle greenhouse gas regulations as a result of EPA's denial of California's waiver application plainly "impairs or impedes" their interest in enforcing such regulations. See Yniguez v. Arizona, 939 F.2d 727, 735 (9<sup>th</sup> Cir. 1991) ("the question ... is whether the district court's decision will result in practical impairment" of the interests of the applicants for intervention) (emphasis in original); United States v. City of Los Angeles, 288 F.3d at 398 ("By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues") (citation omitted). The courts are especially sensitive to the needs of states to intervene in actions that implicate state laws and policy interests. See Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135 (1967) (allowing California to intervene as of right in an antitrust enforcement action to assert "California interests in a competitive system"). As a related matter, standing under the CAA is clear where a state sues on its own behalf to vindicate the administration of its air program. West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004); Massachusetts v. EPA, 127 S.Ct. 1438, at 1454-55 (a state suing to protect its sovereign interests is entitled to special solicitude in a standing analysis under the CAA).

25. Fed. R. Civ. P. 24(b), which provides for permissive intervention, gives a federal court discretion to allow intervention when the proposed intervenor makes a timely application demonstrating that its “claim or defense and the main action have a question of law or fact in common.” In exercising such discretion, courts “shall consider whether the intervention will unduly delay or prejudice the rights of the original parties.” Id.; see also Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 101 F.R.D. 497, 502 (E.D.N.Y. 1984) (possibility of undue delay or prejudice is the “principal consideration”).

26. As described above, EPA’s denial of California’s waiver application also preempts Proposed Intervenors’ regulations because they cannot enforce such regulations without a waiver from EPA. See, e.g., Motor Vehicle Manufacturers Assoc. v. Jorling, 17 F.3d 521, 534 (2<sup>nd</sup> Cir. 1994) (New York can adopt, but not enforce, California emissions standards without a waiver from EPA).

**C. California May Not Adequately Represent Proposed Intervenors’ Interests.**

27. Unlike Fed. R. Civ. P. 24(a), Fed. R. App. P. Rule 15(d) does not, on its face, require an intervenor to show inadequate representation by the parties in the litigation. Nevertheless, Proposed Intervenors would satisfy this element of Rule 24(a). According to the Supreme Court, “[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest ‘may be’

inadequate; and the burden of making that showing should be treated as minimal.”

Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972).

28. As this Court stated in Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9<sup>th</sup> Cir.1983):

This court has consistently followed Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10, 92 S.Ct. 630, 636 n.10, 30 L.Ed.2d 686 (1972) in holding that the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests “may be” inadequate and that the burden of making this showing is minimal.

Id., at 528. See also Southwest Center for Biological Diversity, 268 F.3d at 822-23.

Thus, the proposed intervenor need only show that the representation of its interest may be inadequate, not that representation will in fact be inadequate. See Diamond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986). Moreover, “[a] governmental party that enters a lawsuit solely to represent the interests of its citizens ... differs from other parties, public or private, that assert their own interests, even when these interests coincide.” United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 992 n.21 (2d Cir. 1984) (emphasis added). Any doubts about intervention should be resolved in favor of it. See Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993).

29. Proposed Intervenor's authority to enforce such emissions regulations is derived from California as a result of that state's unique status under the Clean Air Act. California, however, may prosecute or settle this action in a manner that does not square with the interests of the Proposed Intervenor. This potential difference between the interests of the Proposed Intervenor and California is not theoretical. Some of the Proposed Intervenor have previously found themselves opposed to California in motor vehicle emissions regulations cases. See, e.g., Assoc. of Int'l Auto. Mfrs. v. Comm'r, Mass. Dep't of Env. Prot., 208 F.3d 1, 5, 7-8 (1<sup>st</sup> Cir. 2000) (when California repealed its "Zero Emissions Vehicle" [ZEV] program and entered into a Memoranda of Understanding [MOA] with auto manufacturers, Massachusetts could not adopt the MOA for its own regulatory program because the content of the MOA was not considered "standards" under CAA §§ 209, 177). Accordingly, the interests of the Proposed Intervenor may not be adequately represented by California.

**D. Proposed Intervenor's Intervention Is Timely.**

30. Fed. R. Civ. P. 15(d) provides in relevant part that a motion for intervention is timely if filed within 30 days after the petition for review is filed. This Motion for Leave to Intervene is being filed within this time period and is therefore timely.

31. Allowing the State of Iowa and the State of Florida Department of Environmental Protection to intervene to protect their own rights will also not unduly delay or prejudice the rights of any other party.

32. Petitioners State of California, by and through Governor Arnold Schwarzenegger, and the California Air Resources Board ("CARB") support this motion to intervene.

### **CONCLUSION**

WHEREFORE, for the foregoing reasons, the State of Iowa and the State of Florida Department of Environmental Protection respectfully request that this Court grant their motion to intervene as party-petitioners.

Dated: January 31, 2008



Respectfully submitted,

FOR THE STATE OF IOWA  
THOMAS J. MILLER  
ATTORNEY GENERAL



DAVID R. SHERIDAN  
Assistant Attorney General  
Environmental Law Division  
Lucas State Office Bldg.  
321 E. 12<sup>th</sup> Street, Ground Flr.  
Des Moines, IA 50319  
Phone: (515) 281-5351  
Fax: (515) 242-6072  
E-mail: [dsherid@ag.state.ia.us](mailto:dsherid@ag.state.ia.us)

STATE OF FLORIDA  
DEPARTMENT OF  
ENVIRONMENTAL PROTECTION  
BARNEY J. "JACK" CHISOLM, JR.,  
Deputy General Counsel  
3900 Commonwealth Blvd. -- MS 35  
Tallahassee, FL 32399-3000  
Phone: (850) 245-2275  
Fax: (850) 245-2302  
E-mail: [jack.chisolm@dep.state.fl.us](mailto:jack.chisolm@dep.state.fl.us)

### **CERTIFICATE OF SERVICE**

On January 31, 2008, I caused a true and accurate copy of the foregoing Motion to Intervene as Petitioners to be served on the following by first class mail:

Michael B. Mukasey, United States  
Attorney General  
U.S. Department of Justice, Room 4400  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001

Honorable Stephen L. Johnson, Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building, Room 3000  
1200 Pennsylvania Ave., N.W.  
Mail Code 1101A  
Washington, D.C. 20460

Ronald J. Tenpas  
Acting Assistant Attorney General  
U.S. Department of Justice  
Environment and Natural Resources Division  
P.O. Box 7415  
Ben Franklin Station  
Washington, D.C. 20044-7415

Marc Melnick  
Deputy Attorney General  
California Department of Justice  
1515 Clay Street, 20<sup>th</sup> Floor  
Oakland, CA 94612-0550

Andrew M. Cuomo  
New York Attorney General  
Katherine Kennedy, Benjamin  
Gutman and Yueh-ru Chu  
Assistant Attorneys General  
Environmental Protection Bureau  
120 Broadway, 26<sup>th</sup> Floor  
New York, NY 10271

Jeffrey A. Taylor, Interim  
United States Attorney  
for the District of Columbia  
555 - 4th Street, N.W.  
Washington, D.C. 20530

U.S. Environmental Protection  
Agency  
Ariel Rios Building, Rm. 3000  
1200 Pennsylvania Ave., N.W.  
Mail Code 1101A  
Washington, D.C. 20460

Roger R. Martella, Jr.  
General Counsel  
U.S. Environmental Protection  
Agency  
Office of General Counsel  
Ariel Rios Building, Rm 2310A  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Ron Gitek  
Assistant Attorney General  
State of Minnesota  
Office of the Attorney General  
445 Minnesota St., Suite 900  
St. Paul, MN 55101-2127

Martha Coakley  
Massachusetts Attorney  
General  
Frederick D. Augenstern  
Assistant Attorney General  
1 Ashburton Place, 18th Floor  
Boston, MA 02108

Terry Goddard, Arizona Attorney General  
Joseph Mikitish and James Skardon  
Assistant Attorneys General  
1275 W. Washington  
Phoenix, AZ 85007

Joseph R. Biden III  
Delaware Attorney General  
Valerie S. Csizmadia  
Deputy Attorney General  
Delaware Attorney General's Office  
102 W. Water Street  
Dover, DE 19904

G. Steven Rowe, Maine Attorney General  
Gerald D. Reid, Assistant Attorney General  
Chief, Natural Resources Division  
Department of the Attorney General  
6 State House Station  
Augusta, ME 04333

Anne Milgram, New Jersey Attorney General  
Lisa Morelli, Assistant Attorney General  
Richard J. Hughes Justice Complex  
25 Market Street, P.O. Box 093  
Trenton, NJ 08625

Richard Blumenthal  
Connecticut Attorney General  
Kimberly Massicotte  
55 Elm Street, P.O. Box 120  
Hartford, CT 06106

Lisa Madigan, Illinois Attorney  
General  
Matthew Dunn & Gerald Karr  
Sr. Assistant Attorneys General  
Environmental Bureau  
69 West Washington Street,  
Suite 1800  
Chicago, IL 60602

Douglas F. Gansler  
Maryland Attorney General  
Kathy M. Kinsey  
Assistant Attorney General  
Maryland Department of the  
Environment  
1800 Washington Boulevard  
Baltimore, MD 21230

Gary K. King  
New Mexico Attorney General  
Stephen R. Farris  
Assistant Attorney General  
P.O. Drawer 1508  
Santa Fe, NM 87504-1508

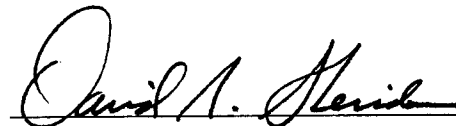
Hardy Myers, Oregon Attorney General  
Philip Schradle, Special Counsel  
to the Attorney General  
Paul S. Logan, Assistant Attorney Gen.  
1162 Court St. N.E.  
Salem, OR 97301

Pennsylvania Department of  
Environmental Protection  
Susan Shinkman, Chief  
Counsel  
Kristen M. Campfield  
Assistant Counsel  
Rachel Carson Bldg., 9th Floor  
P.O. Box 8464  
Harrisburg, PA 17105

Patrick C. Lynch  
Rhode Island Attorney General  
Patricia K. Jedele  
Special Assistant Attorney General  
Office of the Attorney General  
150 South Main Street  
Providence, RI 02903

William H. Sorrell  
Vermont Attorney General  
Kevin O. Leske, Assistant  
Attorney General  
109 State Street  
Montpelier, VT 050609

Rob McKenna, Washington Attorney General  
Leslie Seffern, Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40117  
Olympia, WA 98504



DAVID R. SHERIDAN  
Assistant Attorney General  
Iowa Department of Justice



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEC 19 2007

OFFICE OF THE  
ADMINISTRATOR

The Honorable Arnold Schwarzenegger  
Governor of the State of California  
State Capitol  
Sacramento, California 95814

Dear Governor Schwarzenegger,

As I have committed to you in previous correspondence, I am writing to inform you of my decision with respect to the request for a waiver of Federal preemption for motor vehicle greenhouse gas emission standards submitted by the California Air Resources Board (CARB).

As you know, EPA undertook an extensive public notice and comment process with regard to the waiver request. The Agency held two public hearings: one on May 22, 2007 in Washington, D.C. and one in Sacramento, California on May 30, 2007. We heard from over 80 individuals at these hearings and received thousands of written comments during the ensuing public comment process from parties representing a broad set of interests, including state and local governments, public health and environmental organizations, academia, industry and citizens. The Agency also received and considered a substantial amount of technical and scientific material submitted after the close of the comment deadline on June 15, 2007.

EPA has considered and granted previous waivers to California for standards covering pollutants that predominantly affect local and regional air quality. In contrast, the current waiver request for greenhouse gases is far different; it presents numerous issues that are distinguishable from all prior waiver requests. Unlike other air pollutants covered by previous waivers, greenhouse gases are fundamentally global in nature. Greenhouse gases contribute to the problem of global climate change, a problem that poses challenges for the entire nation and indeed the world. Unlike pollutants covered by the other waivers, greenhouse gas emissions harm the environment in California and elsewhere regardless of where the emissions occur. In other words, this challenge is not exclusive or unique to California and differs in a basic way from the previous local and regional air pollution problems addressed in prior waivers.

Also, I firmly believe that, just as the problem extends far beyond the borders of California, so too must be the solution. Congress has recognized the need for very aggressive yet technically feasible national standards to address greenhouse gases and energy security by passing the Energy Independence and Security Act. Just today the President signed these national standards into law, providing environmental benefits and economic certainty for Californians and all Americans. I strongly support this national approach to this national challenge which establishes an aggressive standard of 35 miles per gallon for all 50 states, as opposed to 33.8 miles per gallon in California and a patchwork of other states. This legislation

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EXHIBIT A

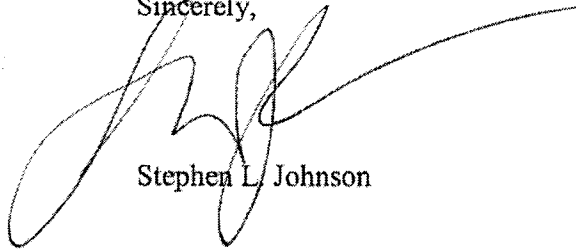
will deliver energy security benefits and bring a much needed national approach to addressing global climate change, improving the environment for all Americans.

In light of the global nature of the problem of climate change, I have found that California does not have a "need to meet compelling and extraordinary conditions." Accordingly, I have decided that EPA will be denying the waiver and have instructed my staff to draft appropriate documents setting forth the rationale for this denial in further detail and to have them ready for my signature as soon as possible.

Please be assured that my decision in this matter is made specific to the facts and circumstances of this request, which, as explained above, are distinctly different from prior waiver requests. I do not intend for this decision to affect any future requests by the State of California for waiver determinations for non-greenhouse gas emissions from vehicles.

Finally, I want to acknowledge the leadership that you and your state have shown to increase vehicle fuel economy, to address energy security, and to reduce greenhouse gases. I agree that increased vehicle standards can be a win-win for the environment and the economy. I have no doubt that the national standards Congress adopted and the President signed into law this week were enacted, in part, because of your efforts.

Sincerely,

A handwritten signature in black ink, appearing to be "S. Johnson", with a long, sweeping horizontal line extending to the right.

Stephen L. Johnson

cc: Governor Janet Napolitano  
Governor Bill Ritter  
Governor Charlie Crist  
Governor Deval Patrick  
Governor Martin O' Malley  
Governor John Baldacci  
Governor Jon S. Corzine  
Governor Eliot Spitzer  
Governor Ted Kulongoski  
Governor Don Carcieri  
Governor Jon Huntsman, Jr.  
Governor Jim Douglas  
Governor Christine Gregoire  
Governor M. Jodi Rell  
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Representative John Campbell  
Representative Lois Capps  
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Representative Jim Costa  
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Representative John Doolittle  
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Representative Anna Eshoo  
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Representative Mike Honda  
Representative Duncan Hunter  
Representative Darrell Issa  
Representative Tom Lantos  
Representative Barbara Lee  
Representative Jerry Lewis  
Representative Zoe Lofgren  
Representative Dan Lungren  
Representative Doris Matsui  
Representative Kevin McCarthy

- Representative Howard "Buck" McKeon  
Mary D. Nichols, California Air Resources Board